Judge

STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER M. MURRAY
CHIEF JUDGE PRO TEM

August 5, 2009

Chief Justice Marilyn J. Kelly
C/O Corbin Davis, Court Clerk
Michigan Hall of Justice
925 W. Ottawa Street
P.O. Box 30052
Lansing, MI 48909

Re: Administrative Order 2009-04

Dear Chief Justice Kelly and Justices:

Please accept these remarks on Administrative Order No. 2009-04, which contains proposed rules on disqualification for Supreme Court Justices. As discussed below, I do not have a view as to which option is the best one for the Supreme Court to adopt, except to say that whatever substantive rules are chosen, the Court should continue its "traditional procedure"[1] of each Justice individually deciding recusal motions without subsequent review. My view is based upon-as is the focus of this letter-the importance of the presumption of judicial impartiality that has existed in this state and nation since their inceptions. I firmly believe that if the Court keeps this important principle at the forefront of its decision, the Court will inevitably proceed to the right conclusion.

As each of you knows quite well, every member of the judiciary takes a simple but critical oath when taking our respective offices. We swear to uphold the constitutions of this state and nation, and to do so to the best of our ability. Because of this important responsibility, judges hold a unique position of trust in society, and both in practice and theory, a presumption exists that judges are fair, honest and impartial. That has always been the case. Chief Justice Roberts recently spoke on this very issue in *Caperton v A T Massey Coal Co*, 556 US ___, ___ (2009), where he (joined by Justices Scalia, Thomas and Alito) said:

[1] See *Citizens Protecting Michigan's Constitution v Secretary of State*, 482 Mich 949, 950; 755 NW2d 147 (2008) (Statement of Kelly and Cavanagh, JJ.)

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> trust that they will live up to this promise. See *Republican Party of Minn v White*, 536 US 765, 796 (2002) (Kennedy, J., concurring) ("We should not, even by inadvertence, 'impute to judges a lack of firmness, wisdom, or honor" (quoting *Bridges v California*, 314 US 252, 273 (1941))).

In the same vein, the Michigan Supreme Court and Court of Appeals have made clear on numerous occasions over the past decades that any argument that judges or justices either have or could have a bias against a party (or attorney) faces a heavy presumption of judicial impartiality. For example, 50 years ago the Court held in *Mahlen Land Corp v Kurtz*, 355 Mich 340, 350-351; 94 NW2d 888 (1959), that a challenged judge:

> stands in our eyes garbed with every presumption of fairness, and integrity, and heavy indeed is the burden assumed in this Court by the litigant who would impeach the presumption so amply justified through the years.

This important principle was more recently reinforced by the Court in *Cain v Dept of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1994). Relying on these cases, our Court has repeatedly concluded that "it is presumed that a trial court is fair and impartial and a litigant who would challenge this presumption has a heavy burden." *S C Gray Inc v Ford Motor Co*, 92 Mich App 789, 810-811; 286 NW2d 34 (1979); *Van Buren Twp v Garter Belt Inc*, 258 Mich App 594, 598; 673 NW2d 111 (2003).

So, we have this strong presumption, and have had it for many years. And, there are many good reasons for it. As Chief Justice Roberts stated, we all take oaths to be faithful to the law, and we all do our best to adhere to that oath. We also know that this is in fact the case with the Michigan judiciary.

I. Is there a need?

The proposed standards under consideration are quite detailed, covering a gamut of issues and areas. Although this is not the main focus of my letter, the first question should be whether there is a need for more rules? Michigan judges are already subject to the Michigan Judicial Code of Conduct that contains many ethical standards which govern critical areas of judicial behavior and ethics. It also appears that the Court considers itself bound by the substantive recusal provisions within MCR 2.003. See *Citizens Protecting Michigan's Constitution v Secretary of State,* 482 Mich 949, 951 n 3; 755 NW2d 147 (2008). Hence, there are standards that apply to the Court, and they do not appear to be lacking in detail or areas of coverage. Indeed, our Court and all trial courts have used them for years, and the Supreme Court has recognized that these judicial canons "serve to maintain the integrity of the judiciary and the rule of law." *Caperton, supra,* slip op at 19.

If there were evidence of a large number of legitimate recusal motions filed in the Supreme Court, then it would be understandable to consider adopting new recusal rules.[2] But, the anecdotal evidence shows that there is not.[3] The media, and few special interest groups, have said there is a need for "transparency" in recusal decisions. However, we cannot allow time-honored, meaningful and reasonable rules and presumptions about judicial impartiality to be disregarded based upon subjective beliefs about how the judiciary should act, especially when there is no cognizable problem. In sum, if we all agree that judges are presumed to be impartial and honest, and that with the possible rare exception *in fact are* honest and impartial, and recognizing that recusal motions in the appellate courts are exceedingly rare, why is it necessary to impose new, technical rules to govern a situation that needs no further governing? See *Caperton*, *supra*, slip op at 14 (Roberts, C.J., dissenting) ("sometimes the cure is worse than the disease").

II. The Presumption and individual decision-making

The real point of my submission, however, is to reinforce the importance to our judiciary that we presume each one of us *is already* impartial and honest, and that respecting that presumption should result in leaving recusal decisions to each justice alone. As detailed below, this recent disqualification issue seems to have arisen because of the constitutional system of electing judges in our state, and not from a plethora of recusal motions or any difficulty in deciding them. Although this electoral system is the system we have had throughout our lifetime, and will likely have long after we are gone from these positions, the issues of recusal standards and who decides those motions, have only arisen over the last six years or so. The explanation we get from many outside organizations for this new concern? Money.

Anyone following Michigan judicial elections knows that a great deal of money is spent on Supreme Court races, and to a far lesser extent on those involving the Court of Appeals and trial courts. Raising and spending money is, of course, a necessary aspect of successfully running for election. Direct and indirect expenditures are made by every candidate committee and independent committee. The money raised is then spent by those committees and other third party organizations on television advertisements and other media avenues. The embarrassing, political hyperbole contained in much of that advertising has done nothing to maintain the public's perception of the judiciary. But the public's manufactured view of how incapable we are of setting aside campaign issues is not a proper basis to change the law in Michigan.[4]

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[2] Although I have no statistics from our Court, in my seven and a half years on the Court of Appeals I cannot recall any recusal motions filed against any judge on my panels. Also of interest is the June 24, 2009 written testimony on HJR P submitted by Richard McClelland to the House Judiciary Committee. Mr. McClelland represents that since 2003 one attorney filed 11 recusal motions with the Supreme Court, while only 2 other attorneys had done so during that same time.

[3] It seems that the present issue in Michigan has in large part been manufactured by a small handful of attorneys and politicos who have tried to turn our system of electing justices into a basis for arguing that certain justices are not "impartial."

[4] If public perception is a relevant consideration, establishing a rule to review justices decisions on ethical issues when no documented need has been shown only reinforces the public misperception that there is a need to act in this area.

Importantly, the law has recognized that judges can set aside campaign issues and decide cases impartially. As both our Court and several of our sister states have concluded, the presumption of impartiality applies even when, as we have seen here in Michigan in more recent years, challenges to judges or justices are made on the basis of campaign activity. For example, in *In re Estate of Susser*, 254 Mich App 232; 657 NW2d 147 (2002), our Court held that the presumption of judicial impartiality had not been overcome by the argument that the trial court was biased in favor of a witness because the witness had managed the trial court judge's prior campaign. Our Court held that the allegation of bias because of campaign activity - without more evidence that there was actual bias on the part of the judge - was insufficient to overcome the presumption of judicial impartiality. *Id.* at 236-237. Other states have come to the same conclusion. In *In re Disqualification of Kessler*, 117 Ohio St 3d 1233; 884 NE2d 1086 (2005), the Chief Justice of the Ohio Supreme Court found no basis for disqualifying a trial court judge even though a lawyer representing a party had assisted the trial court judge's opponent in the last judicial election:

> I find no basis for ordering the disqualification of Judge Kessler. "[T]he fact that a party or lawyer in a pending case campaigned for or against the judge is not a grounds for disqualification." *In re Disqualification of Cleary*, 77 Ohio St 3d 1246-1247; 674 NE2d 357 (1996). Absent some additional reason supporting a party's claim of bias, this court and others have always assumed that judges can remain impartial when an attorney or party who voiced opposition to the election of the judge appears in the judge's courtroom. Flamm, Judicial Disqualification (1996) 194 Section 643. See *Pierce v Charity Hosp of Louisiana at New Orleans*, 550 So. 2d 211, 214-215 (La App, 1989) ("A judge is often in the position of handling matters which involve an attorney who has campaigned [for] or contributed to the judge's opponent," yet absent some evidence of bias, courts will not presume that bias or the appearance of bias exists); *McDermott v Grossman*, 429 So 2d 393 (Fla App 1983) ("Where a lawyer voices his opposition to the election of a judge, it is assumed that the judge will not thereafter harbor prejudice against the lawyer affecting the judge's ability to be impartial in cases in which the lawyer is involved.")

As can be seen, the Chief Justice of Ohio relied upon decisions of similar ilk from Louisiana and Florida. See *Charity Hosp of Louisiana, supra* and *Grossman, supra.*

It is therefore clear that most political activity arising from judicial elections does not, in the usual course, require judicial disqualification. To say that it does ignores reality, and renders the presumption meaningless. *Caperton, supra,* slip op at 13 ("Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case.").[5]

[5] *Caperton* is only somewhat enlightening on this issue. The Court repeatedly indicated how the facts in *Caperton* were "rare" and "extreme", which is the reason why the Court held that the failure to recuse violated the high standards of the Due Process Clause. See *Caperton, supra*, slip op at 13, 16 (noting the

If you look back to your days on the Court of Appeals, I'm sure you will recall the times when a colleague would initiate their own recusal, whether it be on the motion docket, on an administrative order, or on case call. The judge, for his or her own reasons, would indicate an inability to objectively sit on a case. The judge would be replaced, and the case would move forward. No one would question that judges decision, because we all trust and know that each judge would make the decision conscientiously, honestly, reasonably, and in consultation with the rules and canons. That is the way our system works for all judge initiated recusals, which are by far the more common situation. And, it is all premised on the valid presumption of impartiality that has rightly existed for years.

To be consistent and true to the presumption of impartiality that this Court has adhered to for all these many years, it would seem to me that the Court should not invoke a rule of review over their colleagues decision. Absent any evidence that the presumption should not apply, and recognizing that a "judge's own inquiry into actual bias ... is not one that the law can easily superintend or review...", *Caperton, supra,* slip op at 13, the Court should leave to each justice a decision as to whether they cannot impartially decide a case. In truth, only the particular justice can know whether he or she can sit impartially on a case, and allowing Court review of a colleague's decision would only create more rancor amongst members of the Court as they second-guess their colleagues ethical decision.[6] And, as noted, there is no evidence of a need in this state to have such a review.

III. The real problem

Indeed, the answer to the problem does not rest in creating a judicial disqualification rule or reviewing a colleagues' decision, as the problem did not arise from a history of improper recusal decisions. Rather, the problem and ultimate remedy lie at the feet of our state law requiring the election of judges in general, and appellate judges in particular. This electoral system is fraught with potential problems, some of which have been noted above, but those problems do not result in judicial partiality, or in any documented instances of actual bias. Instead, the problem created by elections is that it provides the impetus for political parties and other interested groups to argue that a judge or justice lacks the appearance of impartiality because of campaign activity, whether it be contributions, uncontrollable (from the candidates' perspective) third party activities, or political party advertisements, amongst other things. All of these varying campaign activities that occur in Michigan every two years provide great fodder to the media and political parties, and a limited number of attorneys, to assert that the justices must not be impartial.

"extreme facts of this case"), and 20 ("application of the constitutional standard implicated in this case will thus be confined to rare instances."). Nothing in *Caperton*, however, called into question the West Virginia practice of each justice deciding a recusal motion on his own.

[6] The Due Process Clause as interpreted in *Caperton* would serve as a safety clause for those rare or exceptional cases.

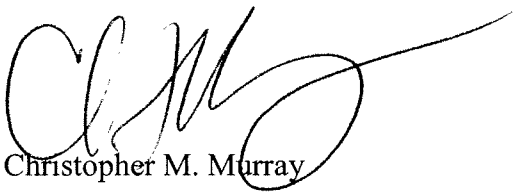
In *Republican Party v White,* 536 US 765, 788-789 (2002), Justice O'Connor discussed the potential difficulties encountered by judges when a state decides to have an elected judiciary:

> We of course want judges to be impartial, in the sense of being free from any personal stake in the outcome of the cases to which they are assigned. But if judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case. Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects. Even if judges were able to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it, the public's confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so.
>
> Moreover, contested elections generally entail campaigning. And campaigning for a judicial post today can require substantial funds. Unless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, a limitation unrelated to judicial skill, the cost of campaigning requires judicial candidates to engage in fundraising. Yet relying on campaign donations may leave judges feeling indebted to certain parties or interest groups. Even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary. [citations omitted.]

A similar comment was made more recently in *New York State Bd of Elections v Lopez-Torres,* 552 US 196, __ (2008) (Stevens, J., concurring). In my view if we rid ourselves of electing judges, and in particular appellate judges, any perceived problem with the impartiality of the Michigan judiciary would end. But, as poll after poll has shown, Michigan voters do not want to give up this particular right to vote.

In light of the above, and with all due respect to the Court, I would simply caution the Court to proceed slowly and deliberately when deciding this issue, and to avoid adopting a rule that calls for the Court to review a colleague's disqualification decision.

Very truly yours,



Christopher M. Murray

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